considered by the lower court, it is not in the record, and we can only consider the case, as to questions of fact, upon the record certified to us from the trial court as provided by law.

The judgment of the corporation court of the city of Staunton is affirmed.

BUCHANAN, J., absent.

CLEM *v.* GIVEN'S EX'R *et al.*

Nov. 22, 1906.

[55 S. E. 567.]

Courts—Jurisdiction—Real Property of Nonresident—Process—Publication.—It is competent for a state to provide by statute that the title to real estate within its limits shall be settled and determined by suit in which defendant, being a nonresident, is brought into court by publication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 48.]

Process—Publication—Actions in Which Authorized—Specific Performance.—Va. Code 1904, §§ 3230-3232, providing for process by publication, and section 3232, declaring that "upon any trial or hearing under this section such judgment, decree, or order shall be entered as may appear just," comprehend quasi proceedings in rem, the object of which is to reach and dispose of property within the state, and therefore in an action for specific performance of a contract of sale of real estate brought against a nonresident executor, and the widow and children of the vendor, it was proper to proceed against the executor by publication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 100.]

Appeal from Circuit Court, Augusta County.

Bill by W. J. Clem against J. E. Givens, executor of W. C. Givens, deceased, and others. From judgment sustaining defendants' demurrer, plaintiff appeals. Reversed.

T. K. Hackman, for appellant.

Timberlake & Nelson, for appellees.

WHITTLE, J. The bill in this case was filed by the appellant, W. J. Clem, against J. E. Givens, executor of W. C. Givens, deceased, and the widow and children of the testator, five of the latter being infants, for specific performance of a written contract of sale, between the executor and the appellant, of real estate situated in Augusta county, Va.

By his will, which was probated in the county court of that

county, in which court the executor also qualified, the testator empowered the executor to sell and convey his real estate at any time during the minority of his youngest child, and to distribute the proceeds among his children, paying the shares of minors to their duly qualified guardians. The widow and children are residents of the county of Augusta, but the bill alleges that the executor is a nonresident of the state, and he was proceeded against by publication.

The record shows that at the first calling of the case, by consent of all parties by counsel, it was submitted to the judge of the court for decision in vacation; but it is admitted that the agreement to this submission was not to be considered as a general appearance on the part of the nonresident executor. Subsequently, by demurrer to the bill, he denied the jurisdiction of the court to decree specific performance of the contract in question. The circuit court sustained the demurrer, and dismissed the bill, and the correctness of that ruling is now before us for review.

It may be conceded in the outset that a personal judgment against a nonresident upon substituted process is void, under the due process clause of the fourteenth amendment of the Constitution of the United States, even in the state where rendered. This was distinctly held in the leading case on the subject of Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565, where it was adjudged indispensable to the validity of a proceeding in personam that personal service of process on the defendant be had within the jurisdiction, unless there has been a general appearance, which, of course, operates as a waiver of process. Huling *v.* K. R. & I. Co., 130 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045; Haddock *v.* Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867. If, on the other hand, the proceeding be in rem, or quasi in rem, where the res to be affected by the litigation is within the jurisdiction of the court, notice by publication is ordinarily sufficient.

"Jurisdiction is acquired in one of two modes: First, as against the person of the defendant, by the service of process; or, second, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem. The bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service of process, it is substantially of that character." Boswell's Lessee *v.* Otis, 9 How. (U. S.) 336, 13 L. Ed. 164.

Arndt *v.* Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918, is authority for the proposition, that "a state may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which a defendant being a nonresident, is brought into court by publication."

That was an action to recover possession of land, and to quiet title. At pages 320, 321, of 134 U. S., at pages 558, 559, of 10 Sup. Ct., 33 L. Ed. 918, Mr. Justice Brewer, in response to the suggestion that an action to quiet title is a suit in equity, and that equity acts upon the person, observes: "While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is: What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of nonresidents to such real estate?

"If a state has no power to bring a nonresident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens. And a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits, and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private and public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not beyond its borders—but it may determine the extent of his title to real estate within its limits, and for the purpose of such determination may provide any reasonable methods of imparting notice."

This is an instructive case, and reviews the authorities bearing on the subject under discussion, and it leaves no room to doubt the power of the states to provide substituted process in all proceedings relating to or affecting the titles to lands within their respective limits.

The subject is also interestingly treated in 5 Pomeroy's Eq. Jur. (Pom. Eq. Remedies, vol. 1) §§ 12, 13, 14 and 15. At section 15, the author says: "As a result of statute, it is held in many states that a decree removing a cloud from or quieting title to land within the jurisdiction may be based upon publication of summons. Citing Arndt *v.* Griggs, supra; Bryan *v.* Kennett, 113 U. S. 179, 5 Sup. Ct. 407, 28 L. Ed. 908; Ormsby *v.* Ottman,

85 Fed. 492, 29 C. C. A. 295; Morrison *v.* Marker (C. C.) 93 Fed. 692; Perkins *v.* Wakeham, 86 Cal. 580, 21 Pac. 51, 21 Am. St. Rep. 67; Kundson *v.* Litchfield, 87 Iowa, 111, 54 N. W. 199; Dillon *v.* Heller, 39 Kan. 599, 18 Pac. 693; Oldham *v.* Stephens, 45 Kan. 369, 25 Pac. 863; Short *v.* Caldwell, 155 Mass. 57, 28 N. E. 1124; Scarborough *v.* Myrick, 47 Neb. 794, 66 N. W. 867; Robinson *v.* Kind, 23 Nev. 330, 47 Pac. 1, 977; American B. & L. Assn. *v.* Mathews, 13 Tex. Civ. App. 425, 35 S. W. 690. Likewise, a decree for specific performance, acting upon the land itself, may issue upon such service." Citing Boswell's Lessee *v.* Otis, supra (action to cancel deed); Corson *v.* Shoemaker, 55 Minn. 388, 57 N. W. 134 (reformation); Seculovich *v.* Martin, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106 (suit to compel conveyance by absent trustee).

In a note to section 14, reference is made to the statutes of the various states, including section 3418, Va. Code 1904. That section provides: "A court of equity, in a suit wherein it is proper to decree or order the execution of any deed or writing, may appoint a commissioner to execute the same; and the execution thereof shall be as valid to pass, release, or extinguish the right, title, and interest of the party on whose behalf it is executed, as if such party had been at the time capable in law of executing the same, and had executed it."

It has been held that a deed made by a special commissioner appointed and empowered to convey land under that section passes the legal title of all parties to the suit. Hurt *v.* Jones, 75 Va. 341.

Va. Code 1904, §§ 3230, 3231, 3232, provide for process by publication; and section 3232 declares that "upon any trial or hearing under this section, such judgment, decree, or order, shall be entered, as may appear just." While the language of these sections is general, we are of opinion that it comprehends quasi proceedings in rem, the object of which is to reach and dispose of property within the state.

This construction of the statute is sanctioned by the decision of the Supreme Court of the United States in the case of Roller *v.* Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, a proceeding against a nonresident of Texas to foreclose a vendor's lien upon land in that state. In the course of his opinion, Mr. Justice Brown, at pages 406, 407, of 176 U. S., at pages 412, 413, of 20 Sup. Ct. (44 L. Ed. 520), remarks: "It is true there is no statute of Texas specially authorizing a suit against a nonresident to enforce an equitable lien for purchase money, but article 1230 of the Code of Texas * * * contains a general provision for the institution of suits against absent and nonresident defendants, and lays down a method of procedure ap-

plicable to all such cases. * * * When the statute specifies certain classes of cases which may be brought against nonresidents, such specification doubtless operates as a restriction and limitation upon the power of the court; but where, as in article 1230 of the Texas Code, the power is a general one, we know of no principle upon which we can say that it applies to one class of cases and not to another. Unless we are to hold it to be wholly inoperative, it would seem that suits to foreclose mortgages or other liens were obviously within its contemplation. In any event, this was the construction given to it by the Court of Civil Appeals, and apparently by the Supreme Court of the state, and is obligatory upon this court as a construction of a state statute."

Upon the authority of the foregoing decisions, we conclude that it is clearly within the competency of the state of Virginia "to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court only by publication,"—and we are of opinion that the sections of Va. Code 1904, referred to, though general in their character, offered authority for such procedure.

A fortiori should this be true in the present case, where the nonresident defendant stands in the relation of trustee merely to the property, and is impleaded along with the beneficial owners, who are residents of the state and are before the court on personal service of process.

In the precise form in which it is now presented, the question involved is of first impression in this court. The case of Grubb *v.* Starkey, 90 Va. 831, 20 S. E. 784, was a suit for specific performance, in which the defendants being nonresidents were proceeded against by publication. The court enforced specific performance of the contract, and, as ancillary relief, awarded damages for the breach. The defendants resisted a decree against them in personam on the ground that they had been proceeded against by publication; but the court held that, by their appearance, it acquired personal jurisdiction over them, and decreed accordingly. The case of McGavock *v.* Clark, 93 Va. 810, 22 S. E. 864, was also a suit for specific performance of a contract of sale of real estate. The bill was filed by a resident vendor against nonresident vendees, and prayed for a personal decree against them, as additional security to the land itself, for the purchase money due upon it. But the court denied the prayer, for the obvious reason that the nonresident defendants had been proceeded against by publication, and had never appeared. The distinction between that case and the one under review is, however, quite apparent. The object of this suit is to

acquire title to the land merely, and no relief is sought against the nonresident personally.

For these reasons, we are of opinion that the circuit court erred in sustaining the demurrer to the bill, for which error the decree appealed from must be reversed, and the case remanded for further proceedings.

BUCHANAN, J., absent.

Note.

Suits Affecting Title to Land.

In General.—It is well settled that it is competent for a state to make provision by statute for the settlement and determination of the title to real estate within its limits upon notice to nonresident defendants by publication.

Federal Decisions.—In Hart *v.* Sansom, 110 U. S. 151 (followed in Clark *v.* Hammett, 27 Fed. Rep. 339, and Pitts *v.* Clay, 27 Fed. Rep. 635), the United States Supreme Court held that a decree determining conflicting claims to real estate was not conclusive upon a nonresident defendant summoned by publication only. But in Arndt *v.* Griggs, 134 U. S. 316, the court explained away the case of Hart *v.* Sansom, 110 U. S. 151, and enunciated the doctrine stated above. To the same effect, see Lynch *v.* Murphy, 161 U. S. 247; Bennett *v.* Fenton, 41 Fed. Rep. 283; Morris *v.* Graham, 51 Fed. Rep. 53; Ormsby *v.* Ottman, 85 Fed. Rep. 492.

Subjecting Land to Payment of Debts.—Where the legal title to land within the state is in a nonresident such land may be subjected to the payment of the owner's debts upon service on him by publication. Plumb *v.* Bateman, 2 App. Cas. (D. C.) 156; Zecharie *v.* Bowers, 3 Smed. & M. (Miss.) 641.

Quieting Title.—Although a suit to quiet title to land is not strictly a proceeding in rem, yet, as the decree therein fixes and settles the title to real estate, it is to that extent a proceeding in rem so as to warrant service upon a nonresident defendant by publication. Ormsby *v.* Ottman, 85 Fed. Rep. 492; Morris *v.* Graham, 51 Fed. Rep. 53; Perkins *v.* Wakeham, 86 Cal. 580; Essig *v.* Lower, 120 Ind. 239; Taylor *v.* Ormsby, 66 Iowa 109; Knudson *v.* Litchfield, 87 Iowa 111; Miller *v.* Davison, 31 Iowa 435; Dillon *v.* Heller, 39 Kan. 599; Scarborough *v.* Myrick, 47 Neb. 794.

Partition.—A suit for the partition of land is a proceeding in which service by publication may properly be allowed. Williams *v.* Westcott, 77 Iowa 332; Mason *v.* Messenger, 17 Iowa 261; Patton *v.* Childs, 78 Ga. 352; Allen *v.* Allen, 11 How. Pr. (N. Y. Supreme Ct.) 277; Bergen *v.* Wyckoff, 84 N. Y. 659; Pool *v.* Lamon (Tex. Civ. App. 1894), 28 S. W. Rep. 363; Taliaferro *v.* Butler, 77 Tex. 578; Hardy *v.* Beaty, 84 Tex. 562. But see Sandford *v.* White, 56 N. Y. 359.

Foreclosure of Mortgages.—A suit to foreclose a mortgage, in which no personal judgment is sought, is essentially a proceeding in rem, and in such suit summons may be served upon a nonresident by publication. McCreary *v.* State, 27 Ark. 425; Duke *v.* State, 56 Ark. 485; La Fetra *v.* Gleason, 101 Cal. 246; Blumberg *v.* Birch, 99 Cal. 416; Swift *v.* Van Dyke, 98 Ga. 725; Robertson *v.* Young, 10 Iowa 291; Shields *v.* Miller, 9 Kan. 390; Crombie *v.* Little, 47 Minn. 581; Martin *v.* Pond, 30 Fed. Rep. 15; Palmer *v.* McCormick, 28 Fed. Rep. 541.

But the court has no power to render a personal judgment for a

deficiency. Blumberg *v.* Birch, 99 Cal. 416; Wood *v.* Stanberry, 21 O. St. 142.

A suit to cancel a fraudulent deed of land and revest the title in the plaintiff is an action "for the recovery of real property, or of an estate or interest therein," within § 4994, Mansf. Ark. Dig., allowing nonresident defendants to be brought in by publication in such cases. McLaughlin *v.* McCrory, 55 Ark. 442.

Under the Mo. Rev. Stat., § 5494, authorizing service by publication upon nonresident defendants in suits for the establishment of rights to real property, such service may be had in a suit to set aside a deed as being in fraud of creditors. Adams *v.* Cowles, 95 Mo. 501.

Action to Reform a Deed.—The subject of an action to reform the description of the land in a deed so as to make it include more than that described, is real property, the title of which is sought to be affected, and the relief demanded consists in excluding the defendant from any interest therein, within the meaning of Minn. Gen. Stat. 1878, ch. 66 § 64, allowing service by publication. Corson *v.* Shoemaker, 55 Minn. 386. See also, Shepherd *v.* Ware, 46 Minn. 174.

To Determine Right to Purchase State Land.—A nonresident defendant may be served by publication in an action to determine the right of conflicting claimants to purchase certain state land, brought in pursuance of an order of reference made by the surveyor general. Lobree *v.* Mullan, 70 Cal. 150.

In an action to abate a nuisance, a nonresident who, as the assignee in bankruptcy, holds title to land on which the nuisance is located, may be summoned by publication. Radford *v.* Thornell, 81 Iowa 709.

Conveyance to Hinder or Defraud Creditors.—Lands in this state which have been conveyed to a nonresident of the state, to hinder or defraud creditors, may be subjected to the payment of the debts of the actual owner thereof, and service may be had upon the holder of the legal title residing out of the state, by publication. Keene *v.* Sallenbach, 15 Neb. 200.

A suit to establish a trust in real estate is one in which a nonresident defendant may be brought in by publication. Porter Land, etc., Co. *v.* Baskin, 43 Fed. Rep. 323.

Under Mo. Rev. Stat., § 2022, authorizing publication in suits having for their immediate object the enforcement or establishment of any lawful right, claim, or demand, to or against any real property within the jurisdiction of the court, service by publication may be had against a nonresident corporation, in a suit to fix a trust on land in the hands of the directors, and to subject it to liability for a creditor's debts. Chicago, etc., Bridge Co. *v.* Anglo-American Packing, etc., Co., 46 Fed. Rep. 584.

In an action to remove a cloud on a title to land a nonresident defendant may be summoned by publication. Mitchner *v.* Holmes, 117 Mo. 185; Bancroft *v.* Conant, 64 N. H. 151.

Decree Directing Sale of Property.—In an action to foreclose a mortgage the court can acquire jurisdiction by publication against a nonresident mortgagor to ascertain the amount secured by the mortgage, and to make and enter a valid decree of foreclosure directing a sale of the mortgaged property, and the application of the proceeds to the payment of the amount secured, including costs and expenses. Blumberg *v.* Birch, 99 Cal. 416.